Supreme Court, U.S.
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No. 97-400

In The

Supreme Court of the United States

October Term, 1998

JAMES HOWARD SMITH, Trustee of the Estates of MARILYN A. HANSON and LYNNE M. RICE,

Petitioner,

vs.

LASER, WILSON, BUFFORD & WATTS, P.A., SOUTHERN GUARANTY INSURANCE COMPANY; CONTINENTAL CASUALTY INSURANCE CO.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT LASER, WILSON, BUFFORD & WATTS, P.A.

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STATEMENT PURSUANT TO RULE 29.6

Petitioner incorrectly identified respondent as Laser, Wilson, Buford & Watts, P.C. The correct designation is Laser, Wilson, Bufford & Watts, P.A.

Respondent, Laser, Wilson, Bufford & Watts, P.A., is a professional corporation and has no parent companies and no nonwholly owned subsidiaries.

STATEMENT OF THE CASE

The petitioner's writ of certiorari arises from a summary judgment granted by the district court in a legal malpractice suit brought under Arkansas law. Arkansas malpractice law applies the "case within a case" concept and requires a plaintiff to establish that a different result would have occurred had the alleged malpractice not taken place. The district court held that petitioner could not, as a matter of Arkansas law, establish that a different result would have occurred based upon the doctrine of collateral estoppel. The district court relied upon rulings of an Arkansas trial court and the Arkansas Supreme Court in an underlying suit filed by Jerry and Brenda Smith ("Smiths").

A. The Smith Suit

On July 3, 1992, the Smiths were beaten and robbed in their home by Jeffery Scott and Chris Young. On June 29, 1993, the Smiths filed a lawsuit in Pulaski County (Arkansas) Circuit Court ("circuit court") alleging assault and battery against Scott and Young. In addition, the complaint alleged that Marilyn A. Hanson and Lynne M. Rice had hired Scott and Young to perform these acts. The complaint was later amended to include allegations of outrage and negligence against Hanson and Rice based upon the same acts. A second amendment to the complaint added Southern Guaranty Insurance Company ("Southern Guaranty") and Continental Casualty Company ("Continental") as defendants. Both insurance companies had issued policies which allegedly provided coverage to Hanson and Rice.

Southern Guaranty provided a defense to Hanson and Rice under a reservation of rights. That defense was provided by the firm of Laser, Wilson, Bufford & Watts, P.A. ("Laser firm"). In addition, Hanson and Rice were represented by their personal attorneys, Dale Adams and Michael A. LeBoeuf.

Prior to trial, the Laser firm moved to dismiss the negligence claim against Hanson and Rice arguing that no duty of care existed between Hanson and Rice and the Smiths. That motion was not opposed by Hanson, Rice, or by their personal attorneys. The circuit court concluded, as a matter of law, that no such duty existed and granted the motion. The trial on the intentional tort counts resulted in a judgment in favor of the Smiths and against Hanson and Rice in the amount of $3,000,000.

Following denial of post-judgment motions by Hanson and Rice and entry of judgment in favor of the insurers by the circuit court, the Smiths filed an appeal to the Arkansas Supreme Court. The Smiths, as well as Hanson and Rice, argued that the circuit court erred in dismissing the negligence claim. In reviewing the claims, the court analyzed both an ordinary duty of care and a duty of care based on special relationship. It found both to be absent under the facts and held that a negligence claim could not, as a matter of law, be successful. It affirmed, in all respects, the trial court's decision on the issue of duty.

B. The Laser Firm Suit

Following their unsuccessful appeal, Hanson and Rice, via their trustee in bankruptcy, filed the present legal malpractice action against the Laser firm. The suit alleged that the Laser firm should not have filed the motion to dismiss the negligence claim in the circuit court suit. Hanson and Rice claimed that seeking dismissal of the negligence claim was contrary to their best interests as it operated to eliminate coverage under their insurance policies and precluded the jury from deciding any questions related to the alleged negligence of Hanson and Rice.

A motion for summary judgment, with supporting affidavits, was filed on behalf of the Laser firm on the basis

that relitigation of the negligence issue, specifically the element of duty, was barred by the doctrine of collateral estoppel as applied in Arkansas. That motion was granted by United States District Judge Stephen Reasoner and affirmed by the Eighth Circuit Court of Appeals.

REASONS FOR DENYING THE WRIT

I.

PETITIONER HAS FAILED TO ESTABLISH ANY BASIS FOR GRANTING THE WRIT.

To grant a writ of certiorari, the issue presented should involve either a split of authority among the Circuit Courts of Appeals on an important federal question, an issue decided wrongly by the circuit court in the face of applicable Supreme Court precedent, or involve an important issue of federal law which has not been, but should be, decided by the Supreme Court. *See* U.S. Sup. Ct. R. 10. These bases for Supreme Court jurisdiction correctly express the Court's role as final arbiter of federal issues.

Even when the Court has chosen to address conflicts between state courts and federal courts of appeal, it has done so where the conflicts are based on federal questions. *Cuyler v. Adams*, 449 U.S. 433, 101 S. Ct. 703, 66 L. Ed. 2d 641 (1981) (resolving conflict among circuits and state courts over proper interpretation of Interstate Agreement on Detainers); *Katzinger Co. v. Chicago Metallic Mfg. Co.*, 329 U.S. 394, 67 S. Ct. 416, 91 L. Ed 374 (1947) (resolving conflict between court of appeals and Pennsylvania Supreme Court regarding price fixing). Thus, both Rule 10 and decisions from the Court establish and recognize the long-standing principle that the Court is not an expounder of state law. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 10 L. Ed. 865 (1842).

In the present writ, petitioner has erroneously asserted a denial of due process under the Fifth Amendment to the United States Constitution as the basis for his writ. This is so because the decision of the district court was based upon the Full Faith and Credit statute found at 28 U.S.C. § 1738. The district court held that petitioner could not, under the doctrine of collateral estoppel as applied in Arkansas, relitigate the issue of duty in the Smith suit. Further, because no duty existed, petitioner could not establish a different result would have occurred and, thus, the *prima facie* showing for a legal malpractice claim could not, as a matter of law, be satisfied. Thus, the due process analysis required under these circumstances arises solely within the context of Arkansas law concerning collateral estoppel and not under the United States Constitution.

Equally important, there is no conflict regarding what prior adjudication law to apply. *See, Kremer v. Chemical Constr. Corp.*, 465 U.S. 461 (1982). In *Kremer*, the Court held that federal courts are bound by 28 U.S.C. § 1738 to accept the rules chosen by the state from which the judgement is taken. *See also, Allen v. McCurry*, 449 U.S. 90 (1980). Thus, the Court has already stated a clear position on the relevant issue presented. Moreover, there is no conflict among the circuits regarding the position outlined by the Court. *See, Lommen v. City of East Grand Forks,* 97 F.3d 272 (8th Cir. 1996) (applying Minnesota rules regarding *res judicata* to a federal suit arising out of Minnesota); *Wade v. City of Pittsburgh*, 765 F.2d 405 (3rd. Cir. 1985) (applying Pennsylvania rules regarding *res judicata* to a federal suit arising in Pennsylvania).

In the present case, there is no question the district court applied Arkansas law. See opinion of the district court citing *Fisher v. Jones*, 311 Ark. 450, 844 S.W.2d 954 (1993). Petitioner does not argue that the district court failed to apply Arkansas law, but rather that it applied it erroneously by failing

to state a "full and fair" opportunity to litigate had been provided. Petitioner overlooks the second paragraph of section III of the district court's opinion which provides:

> Unfortunately for Plaintiff, this issue has been fully and fairly adjudicated before two courts previously, and both courts found that the acts of Hanson and Rice did not constitute negligence as a matter of law.

Following this statement, the district court analyzed the decision of the Arkansas trial court and the opinion of the Arkansas Supreme Court affirming that decision which established that two full and fair opportunities to litigate the issue of duty were provided. Therefore, petitioner has failed to establish there is any conflict between federal courts and Arkansas state courts regarding collateral estoppel. Similarly, petitioner failed to establish Arkansas law was applied erroneously.

In summary, petitioner has presented the Court with a question of state, not federal, law. That is, did the district court correctly apply the doctrine of collateral estoppel as defined by the Arkansas Supreme Court? There is no dispute among the circuit courts of appeal or between state and federal courts that state law governs in such circumstances. Nor is there any dispute that Arkansas law was applied by the district court in this case. Finally, this Court, in *Kremer*, has previously addressed the issue presented herein, and the district court correctly applied the law stated therein.

CONCLUSION

Petitioner's writ fails to invoke the Court's jurisdiction and should be denied.

Respectfully submitted,

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